

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

AUGUST 29, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 94-1981

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**D.S. FARMS, A PARTNERSHIP
BY MELVIN M. DANZINGER,
CAROLYN M. DANZINGER,
DAVID J. DANZINGER AND
CYNTHIA L. DANZINGER,**

Plaintiffs-Respondents-Cross-Appellants,

v.

**NORTHERN STATES POWER COMPANY,
A DOMESTIC CORPORATION,**

Defendant-Appellant-Cross-Respondent.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Buffalo County: DANE F. MOREY, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. D.S. Farms, a dairy farm ("the farm"), brought suit to recover for losses to its dairy herd and milk production claimed to have been caused by "stray voltage" from its electrical supplier, Northern States Power

Company.¹ Following the week long jury trial, the jury found NSP causally negligent in the distribution of electricity and the farm not contributorily negligent. It awarded the farm \$1,450,225 in damages. NSP appeals, arguing that (1) it is entitled to judgment notwithstanding the verdict; (2) insufficient evidence supports the verdict; (3) the jury instructions misstated the law and the verdict was ambiguous; (4) NSP is entitled to a new trial due to trial court error; and (5) the trial court erroneously awarded costs for photocopying under § 814.04(2), STATS.

The farm cross-appeals, arguing that the trial court erroneously denied treble damages pursuant to § 196.64, STATS. (1990).² We reject both NSP's and the farm's challenges and affirm the judgment.

FACTS

Consistent with our standard of review, upon a challenge to the sufficiency of the evidence, we set forth those facts of record supporting the verdict. See *Fehring v. Republic Ins. Co.*, 118 Wis.2d 299, 305-06, 347 N.W.2d 595, 598 (1984). After the milking parlor was installed in 1979, the farm experienced production concerns. The cows exhibited nervousness in the parlor, mastitis, rougher looking coats and inability of young stock to properly mature. Attempts to improve milk production included working with a veterinarian, a nutritionist and milking equipment personnel, but met with no success. In 1985, the farm requested NSP to test for stray voltage. NSP performed tests and advised that there was no stray voltage problem. The farm also had an electrician check on farm wiring, but he did not uncover any problems.

¹ "Stray voltage" has been described as neutral to earth voltage, a phenomenon present in all active distribution systems, that can come from a variety of sources both on and off the farm. In unreasonably high amounts flowing along paths that conduct electricity, such as metal and water, it becomes harmful. *Kolpin v. Pioneer Power & Light Co.*, 162 Wis.2d 1, 10, 469 N.W.2d 595, 598 (1991). The farm's expert witness, Gerald Bodman, testified that one milliamp of current has an adverse effect on the majority of cows and that one milliamp of current is the equivalent of .5 volts.

² Because we affirm the judgment, we need not address the farm's additional arguments on cross-appeal raising the issues of negligence per se, strict liability, nuisance and trespass. Cf. *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (court need only address dispositive issues).

In 1986, the farm purchased a volt meter. Jeff Danzinger, one of the farm's partners, discovered a correlation between the voltage readings and the cows' behavior. On nights that he received readings of over one quarter volt, he had problems.

The farm arranged for additional testing and found voltage levels exceeding one-half volt. As a result of the tests, the farm installed an electronic grounding device in 1987. After installation, voltages were reduced to zero. Within a month or two, milk production increased. The cows appeared much calmer, and their health started to improve. Gerald Bodman, professor in the department of biological systems engineering at the University of Nebraska, testified that stray voltage can cause the following symptoms: restlessness, decreased milk production, breeding problems, increased mastitis and cows lapping at, rather than sipping, water. He testified that although the farm's stray voltage problems were solved by 1988, it was reasonable for it to take until early 1994 for the herd to fully recover from the effects.

The herd's veterinarian, Dr. John Bengfort, testified that the farm's herd management was above average. He testified that the cows exhibited symptoms consistent with stray voltage. He testified that once stray voltage is removed, the cows will drink more water and eat more feed and that herd health will improve, resulting in increased production.

The farm called David Winter as their expert witness. His qualifications are unchallenged. Winter testified that he participated and worked on the patent for the electronic grounding system (EGS). A computer device called the Waverider was created to make accurate voltage measurements. Winter testified that based on voltages measured by the Waverider on February 26, 1987, voltages were at a level that was problematic for the herd. Winter testified that the source of the problematic voltage levels was NSP's primary neutral system.

Winter testified that NSP's power system was not adequate to meet the demands of the farm for electricity. He testified that the primary neutral system was not of low enough resistance to prevent voltage spikes from being generated by the power demands of the farm. He further stated that the voltage was adequate to keep things running on the farm, but not adequate to keep the voltage from sagging on the 240 volt system.

Based on his computations, Winter concluded that the average cow on the farm was exposed to one milliamperere with spikes up to 2.6, 90% of the herd would be exposed to .8 milliamperes all night and up to two milliamperes during milking, and 10% of the cows were exposed to 3.6 milliamperes of current flow. He testified that inadequate grounding in the area of the farm was a substantial factor causing the harmful voltage to access the cows.

The trial court ruled that as a matter of law NSP was not negligent with respect to testing, inspection or maintenance of the lines. It also ruled that the interconnection at the Cream/Alma substation was not a factor. Nonetheless, it permitted the matter to be submitted to the jury on the issue of negligence, concluding that the experts' testimony was in dispute as to the issue of grounding. The court also ruled that it was disputed whether voltage fluctuations were a contributing factor to the harm.³

The farm sought damages for losses from 1979 to 1987 due to stray voltage. The matter was submitted to the jury on the issue of common law negligence, causation and damages. The verdict determined that NSP was negligent in the distribution of electricity, causing harmful levels of stray voltage to contact the farm's dairy herd. The jury returned a verdict in favor of the farm and NSP appeals.

JUDGMENT NOTWITHSTANDING THE VERDICT

NSP argues that it is entitled to judgment notwithstanding the verdict, § 805.14(5)(b), STATS., due to (1) the absence of any legal duty; (2) the presence of an intervening force and superseding cause; (3) the applicability of

³ However, the court ruled that there was no violation of WIS. ADMIN. CODE §§ PSC 113.25 or 113.26.

laches and estoppel; and (4) the court's admission of speculative expert testimony.

"A motion for judgment notwithstanding the verdict admits for the purpose of the motion that the findings of the verdict are true, but asserts that judgment should be granted the moving party on grounds other than those decided by the jury." *Kolpin v. Pioneer Power & Light Co.*, 162 Wis.2d 1, 29, 469 N.W.2d 595, 606 (1991). For reasons that follow, we conclude that the trial court properly denied NSP's motion for judgment notwithstanding the verdict.

1. Legal Duty

Negligence requires a duty of care on the part of the defendant, a breach of the duty and an injury caused by the breach. *Johnson v. Seipel*, 152 Wis.2d 636, 643, 449 N.W.2d 66, 68 (Ct. App. 1989). A party may be negligent under common law even if it complies with all applicable statutory and code requirements. *Beacon Bowl, Inc. v. WEPCO*, 176 Wis.2d 740, 769-70, 501 N.W.2d 788, 799-800 (1993). Whether undisputed facts give rise to a duty of ordinary care is a question of law that we review de novo. *Johnson v. Misericordia Comm. Hosp.*, 99 Wis.2d 708, 723, 301 N.W.2d 156, 164 (1981).⁴ Although the facts giving rise to the breach of the duty were hotly contested, the facts giving rise to existence of a duty of care were not. It is undisputed that NSP was the provider of electrical power to the farm. Brian Guenther, "NEV [neutral-to-earth] supervisor" for NSP, agreed that NSP had the responsibility to provide electricity without excessive amounts of current. He also agreed that NSP's grounding on its line and the balance of the neutrals is critical to keep the farm voltages down. Consequently, we conclude that NSP had a duty of ordinary care to provide electricity without harmful effects of stray voltage.

NSP argues that it has no legal duty of ordinary care because the farm failed to provide notice of stray voltage conditions. We conclude that notice requirements do not apply to the facts of this case.

⁴ "The duty of any person is the obligation of due care to refrain from any act which will cause foreseeable harm to others" although the nature of the harm, and the identity of the person or interest harmed is unknown at the time of the act. *Johnson v. Misericordia Comm. Hosp.*, 99 Wis.2d 708, 723, 301 N.W.2d 156, 164 (1981) (citation omitted).

NSP relies on *Snyder v. Oakdale Co-Op. Elec. Ass'n*, 269 Wis. 531, 69 N.W.2d 563 (1955), which holds that a company furnishing electric power for use in a private wiring system is not liable for injuries sustained by reason of a defect in the private system "unless it supplies current actually knowing of these conditions and the current is the cause of the injuries sued for, in which case it is the energizing of the line with knowledge of the conditions and not the conditions themselves which forms the basis of liability." *Id.* at 533, 69 N.W.2d at 564 (quoting *Oesterreich v. Claas*, 237 Wis. 343, 349, 295 N.W. 766, 768 (1941)). Here there was evidence to support the finding that the stray voltage emanated from NSP's own primary neutral system. Consequently, the *Snyder* notice requirements do not apply.

2. Intervening Force and Superseding Cause

Next, NSP argues that the farm's failure to provide notice of stray voltage conditions is a superseding cause of its damages. NSP argues that it was provided only one opportunity to analyze the stray voltage problem; that its tests showed no problem and that the farm's "failure to provide NSP accurate information and opportunities both before and after 1985 dictate that any negligence of NSP is too remote from the injury or damages to impose liability" for its negligence. We disagree.

"One policy ground for relieving a negligent tortfeasor from liability for conduct which has been a substantial factor in producing injury is the intervening and superseding cause doctrine." *Morgan v. Pennsylvania Gen'l Ins. Co.*, 87 Wis.2d 723, 738, 275 N.W.2d 660, 667 (1979). "A superseding cause is an act by a third party, while the plaintiff's conduct is considered under the umbrella of contributory negligence." *Id.* at 736-37 n.1, 275 N.W.2d at 667 n.1. Here, NSP asserts that the plaintiff's own omissions, not those of a third party, relieve it of liability. We conclude that contributory negligence, not superseding cause, is the applicable doctrine and therefore a superseding cause analysis does not apply.

NSP also argues that the farm's failure to provide notice of stray voltage conditions is an intervening force. "An intervening force is one which actively operates in producing harm" RESTATEMENT (SECOND) OF TORTS § 441(1) (1965). However, NSP does not argue that the farm actively produced the harm, but rather failed to give it notice of the harm. Because the basis of

NSP's argument rests with the farm's omissions, it raises the issue of contributory negligence, not issues of intervening force. Consequently, the doctrine of intervening force does not apply.

3. Laches

Next, NSP argues that the farm's complaint should be dismissed under the doctrine of laches. NSP argues that because the farm failed to provide timely and accurate notice to NSP that there was a problem that needed to be addressed, the defense of laches applies. We disagree.

To successfully assert a defense of laches, NSP must establish (1) an unreasonable delay; (2) lack of knowledge that the farm would assert its claim; and (3) prejudice. *Schneider Fuel & Supply Co. v. West Allis State Bank*, 70 Wis.2d 1041, 1053, 236 N.W.2d 266, 272 (1975). The trial court denied the defense of laches because it concluded that any delay on the part of the plaintiff farm was due to NSP's representation after it performed tests in 1985 that there was not any problem with stray voltage. Thus, the trial court concluded that the farm's delay, if any, was reasonable. Based upon the facts as found by the trial court, we agree. Further, NSP fails to assert any facts to support the element of prejudice. Therefore, we cannot dismiss the farm's claims on the basis of laches.⁵

4. Speculative Expert Testimony

Next, NSP argues that it is entitled to judgment notwithstanding the verdict because the verdict is based upon the farm's expert witnesses' speculation and conjecture. NSP claims the farm's expert witnesses' testimony is unreliable because (a) the engineer, David Winter, based his analysis on EGS tests made without a shunt resistor or measurements from the primary neutral; (b) economist Michael Behr based his opinion on data obtained after the

⁵ NSP also argues that equitable estoppel requires dismissal. It fails to identify in what part of the record it raised the defense of equitable estoppel. The portion of the trial transcript that it identifies merely discussed nuisance and laches. Consequently, we decline to address this argument. See *Keplin v. Hardware Mut. Cas. Co.*, 24 Wis.2d 319, 324, 129 N.W.2d 321, 324 (1964).

installation of the EGS device, not on history prior to the time of injury; and (c) agricultural engineer Gerald Bodman based his opinion on the Cream/Alma substation interconnect as a cause of damages.

NSP argues that the trial court must ensure that expert testimony is both relevant and reliable. Relying on *Daubert v. Merrell Dow Pharms.*, 113 S.Ct. 2786, 2795 (1993), and a concurring footnote in *State v. Blair*, 164 Wis.2d 64, 78-81 n.9, 473 N.W.2d 566, 572-73 n.9 (Ct. App. 1991), NSP contends that the trial court should assess the reliability of the experts' underlying data. NSP contends that the trial court must make preliminary assessments of an expert's methodology and that failure to do so is reversible error. *Frymire-Brinati v. KPMG Peat Marwick*, 2 F.3d 183, 186-87 (7th Cir. 1993). We reject NSP's argument.⁶

First, to the extent NSP challenges the admission of testimony without the trial court assessing its reliability, the argument is not a proper basis for judgment notwithstanding the verdict. The admissibility of evidence is not challenged by this motion. *Kolpin*, 162 Wis.2d at 29, 469 N.W.2d at 606.

Second, *State v. Peters*, 192 Wis.2d 674, 534 N.W.2d 867 (Ct. App. 1995), rejected evidentiary challenges to reliability. "[T]he rule remains in Wisconsin that the admissibility of scientific evidence is not conditioned upon its reliability." *Id.* at 687, 534 N.W.2d at 872. Scientific evidence is admissible if (1) it is relevant; (2) the witness is qualified as an expert; and (3) the evidence will assist the trier of fact in determining an issue of fact. *Id.* at 687-88, 534 N.W.2d at 872; *State v. Walstad*, 119 Wis.2d 483, 516, 351 N.W.2d 469, 486 (1984). "Once the relevancy of the evidence is established and the witness is qualified as an expert, the reliability of the evidence is a weight and credibility issue for the fact finder and any reliability challenges must be made through cross-examination or by other means of impeachment." *Peters*, 192 Wis.2d at 690, 534 N.W.2d at 873.

⁶ Objections to Wisconsin's general relevancy test approach have been articulated in the past. See Craig A. Kubiak, Comments, *Scientific Evidence in Wisconsin: Using Reliability to Regulate Expert Testimony*, 74 MARQ. L. REV. 261 (1991); Daniel Blinka, *Scientific Evidence in Wisconsin after Daubert*, 66 WIS. LAW. 10 (Nov. 1993).

The trial court, in its gatekeeping role, may reject relevant evidence for a variety of reasons, including if (1) it is superfluous; (2) it is a waste of time; (3) its probative value is outweighed by prejudicial effect; (4) the jury is able to draw its own conclusions without it; (5) it is inherently improbable or (6) the area is not suitable for expert testimony. *Id.* at 689, 534 N.W.2d at 872.

NSP argues that experts did not "compare the data at hand with known scientific principles," but the record discloses otherwise. Behr, Winter and Bodman all testified that they reviewed the available data from the farm in order to reach their conclusions. "An expert witness may state his relevant inferences from matters perceived by him or from evidence introduced at the trial and seen or heard by him or from his special knowledge, skill, experience or training" *Kolpin*, 162 Wis.2d at 38, 469 N.W.2d at 610 (quoting *Rabata v. Dohner*, 45 Wis.2d 111, 133, 172 N.W.2d 409, 420 (1969)). Reliability of expert testimony is to be attacked on cross-examination. *Peters*, 192 Wis.2d at 690, 534 N.W.2d at 873. NSP has not demonstrated that the experts' testimony is incredible as a matter of law. See *Chapman v. State*, 69 Wis.2d 581, 583, 230 N.W.2d 824, 825 (1975) (Incredible as a matter of law means inherently incredible, such as in conflict with the uniform course of nature or with fully established or conceded facts.). NSP's argument fails to persuade us that as a matter of law the farm's experts' opinions rest purely on speculation and conjecture.

SUFFICIENCY OF EVIDENCE

The standard of review for sufficiency of evidence requires a reviewing court to examine the record for any credible evidence which under any rational view fairly admits of an inference that will support the jury's finding.

Peissig v. Wisconsin Gas Co., 155 Wis.2d 686, 702-03, 456 N.W.2d 348, 355 (1990). For the reasons that follow, we conclude that sufficient credible evidence supports the verdict.

1. Negligence

NSP argues that no credible evidence supports the jury's finding of negligence. It cites evidence to support a finding that it was not negligent, such as the trial court's finding that it was not negligent with respect to inspection, testing and maintenance of its line. It argues that its grounding exceeded code and that the "resistance of the majority of ground rods or their combination on the entire distribution line were relatively good."

NSP's argument misconstrues the function of appellate review.⁷ We must resolve all conflicts in the testimony in the light most favorable to the verdict.

The credibility of the witnesses and the weight afforded their individual testimony is left to the province of the jury. Where more than one reasonable inference may be drawn from the evidence adduced at trial, this court must accept the inference that was drawn by the jury.

Fehring, 118 Wis.2d at 305-06, 347 N.W.2d at 598.

The jury heard days of technical testimony by expert witnesses whose qualifications are unchallenged. The record demonstrates that numerous conflicting inferences could be drawn from the evidence. However, it is the jury's function, not that of the appellate court, to resolve conflicts. We review the record for credible evidence to sustain the jury's verdict, not to search for evidence to sustain a verdict the jury could have reached, but did not. *Id.* at 306, 347 N.W.2d at 598.

The adequacy of the grounding and the level of resistance in the distribution line were issues of fact at trial. The jury could have believed

⁷ Without citation to legal authority, NSP argues: "The standard for changing an answer in the verdict is lesser than for granting judgment notwithstanding the verdict." NSP misstates the law. The standards are qualitatively, not quantitatively, different. See *Kolpin v. Pioneer Power & Light Co.*, 162 Wis.2d 1, 28-29, 469 N.W.2d 595, 606 (1991).

Winter's testimony that resistance on the line was too high, causing harmful voltage to access the cows. Winter testified: "The primary neutral resistance was too high allowing voltage to be developed on the primary neutral as a result of the normal requirements for current to supply the Danzinger's 240 volt loads." He testified that inadequate neutral conductor size, poor neutral connections or inadequate amount of grounding along the neutral were reasons for high resistance. Winter further criticized the lack of grounding within a quarter mile of the farm. "[H]ad they put those grounds in, there could have been a substantial reduction of voltage on the farm just from that simple action." He also testified that voltage changes caused frequent voltage spikes harmful to the cows. The testimony was sufficient to permit the jury to find that NSP breached its duty to distribute electricity without harmful stray voltage.

2. Cause

NSP also argues that the jury's finding of causation is based upon speculative evidence in direct conflict with physical evidence. It contends that physical evidence controls when in clear conflict with testimony, *see Chart v. GMC*, 80 Wis.2d 91, 111, 258 N.W.2d 680, 688 (1977), arguing that "NSP's 1987 parlor testing with the shunt resistor controls over Winters' calculations based on the 1987 EGS tests measured without the shunt resistor." It contends that Winters' calculations must be rejected because they lack sufficient foundation. We disagree.

First, the jury heard testimony that the farm's experts had reviewed NSP's tests and that its test results did not rule out stray voltage problems. Second, NSP's argument essentially asks this court to assess the reliability of the opposing experts' testimonies, which is not a trial or appellate court function. *See Peters*, 192 Wis.2d at 690, 534 N.W.2d at 873. NSP's argument is not based upon "physical evidence," but rather on interpretations of physical evidence. The farm's experts disagreed with NSP's experts' interpretations of the various tests performed. Because the farm's experts' testimony supported the jury's finding of causation, we reject NSP's argument.

3. Damages

Next, NSP argues that (a) the evidence is insufficient to support the jury's finding of damages; (b) the verdict confuses capital loss calculations with those of fair market value, for which there was no evidence; (c) evidence of the farm's "normal trend" was computed contrary to the requirements of Wisconsin law; (d) the economist failed to take into account feed savings analysis and speculated as to milk production loss and (e) damages are excessive. We disagree.

The damages question on the special verdict asked two questions:

What sum of money will fairly and reasonably compensate the Plaintiffs for:

(a) Lost milk production due to harmful levels of stray voltage?

ANSWER: \$ 1161572

(b) Loss of fair market value to their dairy herd due to harmful levels of stray voltage?

ANSWER: \$ 283663

Credible evidence supported the jury's findings. Bodman testified that the effects of stray voltage include lowered milk production and breeding problems. Bodman testified that the period of time from 1987 to early 1994 was a reasonable time frame for the herd to recover from the effects of stray voltage. Michael Behr, a forensic economist, was qualified as the farm's expert to testify with respect to damages. He testified, to the requisite reasonable degree of certainty, that the amount of damages the farm sustained as a result of stray voltage between 1979 to 1993 totaled \$1,726,586. He broke down the total loss into two categories, the cost to replace cattle and lowered milk production. He testified that the total amount of milk loss the farm sustained between 1979 and 1993 was \$1,348,414 and the total amount of capital loss during the same time frame due to stray voltage was \$373,182.

Behr testified to the reasons for his opinions. He testified that a dairy farm typically produces three commodities: (1) milk, (2) beef and (3) young stock. He testified that "capital loss" was the cost of purchasing cattle.

He opined that but for the harmful effects of stray voltage, the herd would have produced enough young to replace damaged cattle. In order to mitigate lost milk production due to damaged cattle, the farm was required to sell cattle and purchase replacements, and the cost of purchasing replacements was taken into account.

Behr further testified as to how he arrived at lost milk production calculations. Based upon farm records, farm finances, the number of cows, his own experience in agricultural economics, as well as publications concerning Wisconsin dairy farming, he calculated what he called a "normal trend line," that is, the general level of production an economist would expect to see under a certain set of conditions, taking into account variations that would occur over time.

For example, in 1979, the 120.70 cows in the herd each produced 12,043 pounds of milk. Behr projected that normal production would have been 14,686 pounds. At the price of \$.1207960, Behr calculated that actual sales were \$175,589 instead of \$214,123. Consequently, Behr arrived at a \$38,534 milk loss for 1979. Behr made a similar analysis for each year through 1993. In 1985 for example, the herd consisted of 256.33 cows. Production slipped to 11,466 pounds. Milk prices increased to \$.1249593. The milk loss for 1985 was calculated to be \$201,367. Behr testified that the farm did not achieve the normal trend until 1993 and was expected to exceed the normal trend.

A party who suffers damage to his business through a wrongful act of another is entitled to compensation for the loss. "[A]s a general rule in tort actions there may be recovery for loss of profits if the plaintiff can show with reasonable certainty the anticipation of profit." *Krueger v. Steffen*, 30 Wis.2d 445, 450, 141 N.W.2d 200, 202 (1966). The proper measure for damages for lost animals is the replacement cost, reflected in market value at the time of the loss. *Rosche v. Wayne Feed Div., Continental Grain Co.*, 152 Wis.2d 78, 82, 447 N.W.2d 94, 96 (Ct. App. 1989). "[E]vidence of the value of full-term calves less the cost of care and feeding to the conclusion of the term is admissible and relevant under a broad evidence rule" when calves are marketed before the completion of the term. *Strauss Bros. Packing Co. v. American Ins. Co.*, 98 Wis.2d 706, 709, 298 N.W.2d 108, 110 (Ct. App. 1980).

NSP argues that Behr failed to account for a variety of factors, such as the general level of management, the feeding, including feed cost savings, the effects of Johne's disease and tornado damage.⁸ The jury could infer, based upon Bodman's and Bengfort's testimony, that the herd was more susceptible to disease, such as Johne's disease, as a result of stray voltage. Also, Behr testified that his calculations took into account these factors. Whether his testimony is to be believed is a credibility issue left to the jury.

NSP also complains that there is no evidence "to support the jury's verdict on post-injury loss of fair market value." The record, however, supports the inference that the cow's general health, including breeding, is affected by stray voltage. Bodman testified that the period from 1987 to early 1994 would be a reasonable time for the herd to recover from stray voltage effects. Behr testified to the requisite degree of reasonable certainty to the farm's anticipation of earnings but for the harmful effects of stray voltage, as well as the cost of replacing damaged animals. Behr report indicates that \$373,182 represented capital loss from 1979 to 1993. The jury awarded \$283,663. Credible evidence supports the verdict.

Next, NSP contends that the farm's counsel unfairly confused the concept of capital loss calculation and fair market value. The record shows that at closing arguments, the farm's counsel stated "Doctor Behr's report has in it a total damage amount including some capital losses or fair market value losses

⁸ Contrary to NSP's assertions, Behr testified that he took into account the tornado, the effects of Johne's disease and the cost of feed, as well as the Danzingers' farm finances and management. Behr's report broke down the losses for milk on a year-by-year basis. On cross, Behr was asked:

Q And you have calculated from a thousand pounds and so on the difference it would make per animal in the cost of doing the feed and so on to indicate what the difference would be relatively between production at say 14,000 and 20,000, correct?

A That is correct.

He further answered on cross that he had taken into account the tornado damage: "I have determined that my damage figure attributable to the stray voltage is consistent with whatever damage may have existed from the storm, and there certainly was some. ... [M]y damage figures attributable to stray voltage acknowledge the fact that the Johne's existed"

for cows, and I'll just lump 'em together, but his report will be in evidence and you can take a look at it."

NSP fails to demonstrate any duplication of damages or any prejudice with respect to using the terms interchangeably. Behr testified that there were two categories of loss: lost milk production and loss associated with purchase of cattle. Behr explained capital loss as follows:

[A] normally operating dairy herd of the size and stability of the Danzingers will normally produce internally, or by itself, enough animals to replace the animals that are culled, and indeed to produce somewhat more animals than that which can be sold as dairy heifers or used for expansion of the herd. ... What we are talking about here is replacement of damaged cattle
....

At closing argument, the farm's counsel stated that he used the term "capital loss" interchangeably with loss to fair market value. Despite whether the two terms should be used interchangeably, the record demonstrates credible evidence to support the verdict's damage finding showing the loss of value to the herd due to the cost of replacing cattle. Because NSP fails to demonstrate how it was prejudiced by the terminology, we do not reverse on appeal.

NSP argues that the calculation of damages was contrary to Wisconsin law because Behr's normal trend was "merely his own subjective opinion, not based upon any statistical analysis applied to the relevant facts of D.S. Farms." The record fails to support this argument. Behr testified that he reviewed the actual production on the farm, as evidenced by milk check stubs and producer milk weights, the level of management, the cost and expenses of feed, the data available since the installation of EGS in 1987 and information concerning dairy production in the state in order to arrive at his opinion. Behr testified:

I do look at ... how they do their rations, how they do their breeding, what's their degree of knowledge with respect to overall management of the herd generally?
And whether or not the kind of things that in this

case the Danzingers are doing are consistent with other farms ... and do those similar practices result in my experience in production that's 10 percent below the state average or 10 percent above it.

Behr testified that the herd is "[c]ertainly I would say in the 15 top percent and possibly in the top 10 percent but not in the top five percent." He testified that he evaluated the Danzinger farm and compared his findings to other Wisconsin farms. An expert witness may state his opinions based upon evidence perceived by him, introduced at trial or from his special knowledge, skill, experience or training. *Kolpin*, 162 Wis.2d at 38, 469 N.W.2d at 610. NSP's attack on Behr's credibility is an issue for cross-examination, not appeal. See *Peters*, 192 Wis.2d at 690, 534 N.W.2d at 873; *Fehring*, 118 Wis.2d at 305-06, 347 N.W.2d at 598.

NSP also argues that because Bodman offered the *only* opinion that lowered milk production was the result of stray voltage and Bodman's opinion was based upon invalid assumptions, the farm failed to meet the burden of establishing its damages to requisite certainty. The record fails to support NSP's argument. Bodman's testimony concerning the effects of stray voltage was based on many factors, including data perceived by him, data introduced at trial, as well as his specialized knowledge, experience and training. The validity of his opinion was a matter for cross-examination. Also, testimony of Behr, Winter and Bengfort support the jury's findings.

We further conclude that the trial court properly determined that damages are not excessive in view of Behr's report that would have supported a damage figure substantially higher than the jury award. It is evident that the jury considered NSP's vigorous cross-examination, which succeeded in convincing the jury to award significantly less than what Behr reported.

JURY INSTRUCTIONS AND SPECIAL VERDICT

NSP argues that the jury was erroneously instructed with respect to causation.⁹ NSP argues that "as instructed, the 'yes' answer to the cause question was a given because NSP will always be contributing some stray voltage absent mitigation devices." It argues that because some stray voltage is always present, *see Kolpin*, 162 Wis.2d at 499-500, 469 N.W.2d at 598, "[t]he issue which the jury should have determined was whether NSP's contribution to the cow contact voltages, in and of itself, caused a harmful level."

The trial court correctly instructed the jury. The trial court has broad discretion in instructing the jury. *McKnight v. GMC*, 143 Wis.2d 67, 69, 420 N.W.2d 370, 371 (Ct. App. 1987). Under Wisconsin's "substantial factor" test, it is sufficient that the farm demonstrate that the utility was negligent and that its negligence was a substantial factor in producing the harm.

[T]here may be several substantial factors contributing to the same result. The contribution of these factors under our comparative negligence doctrine are all considered and determined in terms of percentages of total cause.

Sampson v. Laskin, 66 Wis.2d 318, 325-26, 224 N.W.2d 594, 598 (1975) (footnote omitted). Here, the jury was correctly instructed that in order to find cause, they must find that negligence was a substantial factor in producing the

⁹ The jury was instructed:

The cause question. It's asked whether there was a causal connection between the negligence of any person or party and the damages. These questions do not ask about the cause, but rather, a cause. The reason for this is that there may be more than one cause of damages. The negligence of one person or one party may cause damages or the combined negligence of two or more persons or parties may cause it. Before you can find that a person's negligence was a cause of the damages, you must find that his or its negligence was a substantial factor in producing the damages.

damages. Also, the verdict inquired whether the negligence caused *harmful levels* of stray voltage to contact the dairy herd. Consequently, the instructions were proper.

NSP argues that the verdict was ambiguous.¹⁰ NSP failed to preserve its objection to the form of the verdict. At the instruction and verdict conference, NSP stated that in light of the court's previous rulings and without waiving previous objections, "we have no objection to the form" of the verdict.

Counsel may object to the proposed instructions or verdict on the grounds of incompleteness or other error, *stating the grounds for objection with particularity on the record*. Failure to object at conference constitutes a waiver of any error in the proposed instructions or verdict.

Section 805.13(3), STATS. (Emphasis added.) Given the multi-volume transcript in this record, we conclude that NSP's failure to cite to the record its specific objection to the verdict waives error. *Cf. Tam v. Luk*, 154 Wis.2d 282, 291 n.5, 453 N.W.2d 158, 162 n.5 (Ct. App. 1990).

NEW TRIAL

¹⁰ The verdict asked the following questions with respect to negligence and causation:

1. Was NSP, through its employees and agents, negligent in the distribution of electricity to the plaintiffs?

2. If you have answered Question 1, "yes", then answer this question:

Did that negligence cause harmful levels of neutral to earth (stray) voltage to contact plaintiffs' dairy herd?

3. If you answered Question 2, "yes", then answer this question:

Was that negligence a cause of damage to the plaintiffs' dairy operation?

The jury answered the three questions in the affirmative. The verdict then inquired as to the plaintiffs' negligence, to which the jury answered in the negative.

Next, NSP argues that it is entitled to a new trial because the trial court erroneously (1) misinterpreted the electrical code and (2) misapplied the statute of limitations.¹¹ We disagree.

NSP argues that the trial court erroneously concluded that Wis. ADMIN. CODE § PSC requires nine grounds per circuit mile.¹² NSP contends the correct number is four. The trial court observed that even experts did not agree as to the appropriate application of the code. The trial court determined that "rural electrical distribution systems utilizing multiple ground systems which are grounded to on-farm water systems must have nine grounds per mile."¹³ The court stated: "[I]t doesn't mean you can't prove up that four is all you need because you had all the additional grounds you needed, but based upon the norms in a rural area, I think you have got to have the nine. Because we don't know the quality of the underground piping ... on a farm"

The code sections requiring nine grounds states:

The neutral, which shall be of sufficient size and ampacity for the duty involved, shall be connected to a made or existing electrode at each transformer location and at a sufficient number of additional points with made or existing electrodes to total not less than nine grounds in each mile ... of line, including those

¹¹ NSP also argues that for a variety of reasons, including trial court error, (3) the jury's conclusions were contrary to the great weight and clear preponderance of the evidence and (4) damages are excessive. We have already addressed these issues and do not repeat the discussion here.

¹² Although the matter was submitted to the jury on the basis of common law negligence, and the jury was not instructed with respect to code requirements, NSP contends that it was prejudiced by the court's ruling. Winter testified that NSP's failure to have a minimum of nine grounds per mile on its distribution line was a contributor of the injurious voltages. He also testified that had there been more grounds according to the Wisconsin code, the voltage would have been less, and the current through the cows would have been less. The farm offered into the record the court's order that there should be nine grounds per circuit mile.

¹³ The court gave deference to the PSC's interpretation as evidenced by a letter from one of its engineers to Charles Gustafson, manager of NSP, dated May 13, 1992.

grounds at transformer locations but not including grounds at individual services.

WIS. ADMIN. CODE § PSC at 114-96C.

NSP argues that the above section does not apply. Instead, it argues that the following applies:

The primary neutral conductor ... may be interconnected solidly with the secondary neutrals and may come under the clearance requirements specified for 0 to 750 volts in Order 1232 provided (a) the customer service entrances and supply end are grounded in such a way that the requirements of 1038 are met and (b) or (c) below are complied with.

(b) The neutral is connected to an extended metallic underground piping system or artificial grounds complying with the resistance requirements of Order 1038 at each transformer location and at a sufficient number of additional points to total four ground connections per mile.

WSEC Order 1031.B.5 (5th ed. 1960).

NSP also relies on Order 1038, which provides:

A. Limits The combined resistances if the grounding wire and the connection with the ground shall not exceed 3 ohms for water-pipe connections nor 25 ohms for artificial (buried or driven) grounds. Where it is impracticable to obtain, with one electrode, artificial ground resistance as low as 25 ohms, this requirement shall be waived, and two electrodes at least 6 feet apart, shall be provided.

B. Checking ... Ground connections on distribution circuits should, when installed, be tested for resistance unless multiple grounding is used.

We conclude that NSP fails to demonstrate the trial court misapplied the code. Although the interpretation of the code is generally a question of law, *Wausau Hosps., Inc. v. DHSS*, 95 Wis.2d 601, 605, 291 N.W.2d 602, 604 (Ct. App. 1980), the issue here is not one of interpretation but rather of application. Based upon evidence of record, the trial court concluded that nine grounds applied in rural areas where no common water systems and driven grounds not meeting Order 1038 were used. NSP fails to demonstrate that based upon the record before the court, the trial court erroneously found that the farm was a rural area without a common water system and with driven grounds not meeting Order 1038.

NSP contends that it was precluded by the court's ruling to establish that its construction practices conformed to Order 1038A. We disagree. The trial court specifically stated that its ruling did not mean that NSP could not prove that all it needed was four grounds. NSP cites to the pretrial deposition of Duttee Holmes, Jr. This reference is insufficient to conclude that the court erroneously concluded on the record before it that Order 1038 did not govern.

Next, NSP argues that the trial court misapplied the statute of limitations. It argues that a jury question is presented whether the farm exercised reasonable diligence in discovering NSP's possible causal relationship to the stray voltage. We disagree.

A tort claim accrues on the date the injury is discovered or with reasonable diligence should have been discovered. *Hansen v. A.H. Robins, Inc.*, 113 Wis.2d 550, 560, 335 N.W.2d 578, 583 (1983). "The issue of reasonable diligence is ordinarily one of fact." *Spitler v. Dean*, 148 Wis.2d 630, 638, 436 N.W.2d 308, 311 (1989).

Here, the trial court granted the farm's motion for a directed verdict on the issue of statute of limitations. It concluded as a matter of law that the statute of limitations started to run in 1987. It stated:

Kolpin makes it very clear the standard to use in this type of case, particularly where it is very difficult in this area to determine, as admitted by both sides, to determine what the causes are of the problems that are being

experienced. And it is [the] opinion of the Court that the statute of limitations started to run when the EGS was installed and a neutral to earth voltage was I would call separated from the farm.

Cases should be taken from the jury and verdict directed only if the evidence gives rise to no dispute as to material issues or when evidence is so unbiased that impartial minds come to but one conclusion. *Holloway v. K-Mart Corp.*, 113 Wis.2d 143, 150, 334 N.W.2d 570, 574 (Ct. App. 1983). Here, it is undisputed that the relationship between stray voltage and the injuries it causes is difficult to determine. It is also undisputed that "[t]he Danzingers were checking into stray voltage problems as early as 1983 and 1984" It is also undisputed that the Danzingers did not observe a resolution of their stray voltage problems until they installed the EGS system in 1987. There is no evidence that the Danzingers delayed the installation of the EGS system while knowing that they had a stray voltage problem. Consequently, the trial court correctly determined that the undisputed facts permitted the only reasonable inference: that the Danzingers knew, or with reasonable diligence should have known that they experienced stray voltage problems in 1987 with the installation of EGS. *Cf. Kolpin*, 162 Wis.2d at 27, 469 N.W.2d at 605 ("We hold that the Kolpin's case against Pioneer did not accrue until ... they installed the electronic grounding device.").

PHOTOCOPYING COSTS

In a four-sentence argument, NSP argues that the trial court erroneously assessed costs of photocopying. NSP does not cite to the record or indicate what the photocopies were used for. It points out that in two cases contrary results were obtained, *see Zintek v. Perchik*, 163 Wis.2d 439, 475, 471 N.W.2d 522, 535 (Ct. App. 1991); *Ramsey v. Ellis*, 163 Wis.2d 378, 385-386, 471 N.W.2d 289, 292 (Ct. App. 1991), but does not explain why *Ramsey* should apply here. We do not develop the argument and decline to address undeveloped arguments on appeal. *State v. Gulrud*, 140 Wis. 2d 721, 730, 412 N.W.2d 139, 142 (Ct. App. 1987).

CROSS-APPEAL

The farm argues that the trial court erroneously denied it treble damages under § 196.64, STATS. We disagree. Section 196.64 now provides for treble damages under the following circumstances:

- Public utilities, liability for treble damages. (1) If a director, officer, employe or agent of a public utility, in the course of the discharge of his or her duties, wilfully, wantonly or recklessly does, causes or permits to be done any matter, act or thing prohibited or declared to be unlawful under this chapter or ch. 197, or wilfully, wantonly or recklessly fails to do any act, matter or thing required to be done under this chapter, the public utility shall be liable to the person injured thereby in treble the amount of damages sustained in consequence of the violation. No recovery as in this section provided shall affect a recovery by the state of the penalty prescribed for such violation.
- (2) The burden of proof in an action under sub. (1) rests with the person injured to prove the case by clear and convincing evidence.

The current version of this statute is a response to *Peissig v. Wisconsin Gas. Co.*, 155 Wis.2d 686, 456 N.W.2d 348 (1990), which held that an award of treble damages does not require proof of wilful, wanton or reckless behavior. *Beacon Bowl*, 176 Wis.2d at 774, 501 N.W.2d at 801. Peissig reached this conclusion because gross negligence was abolished in 1962 with *Bielski v. Schulze*, 16 Wis.2d 1, 114 N.W.2d 105 (1962). Because gross negligence was necessary to find treble damages under former § 196.64, STATS., and gross negligence was abolished, then what constituted gross negligence was no longer held to be necessary to support an award of statutory treble damages. *Peissig*, 155 Wis.2d at 694, 456 N.W.2d at 351.

Peissig held that "[i]t is not mere negligence that results in the imposition of liability under sec. 196.64. Rather only actions or omissions amounting to negligence that constitute a failure to comply with the provisions of chs. 196 or 197, warrant the imposition of treble damages." *Id.* at 700, 456 N.W.2d at 354. The farm contends that it is entitled to treble damages because a finding of wilful, wanton or reckless conduct is not required and the record here shows failure to comply with provisions of ch. 196, STATS. We disagree.

"Before *Peissig*, a finding of [wilful, wanton, or reckless] conduct was necessary." *Beacon Bowl*, 176 Wis.2d at 774, 501 N.W.2d at 801. *Peissig* was decided in 1990. Because there is no dispute that EGS was installed in 1987 in response to a suspected stray voltage problem, we conclude that the pre-*Peissig* standard applies. Because a finding of willful, wanton or reckless conduct was required before 1990, and it is undisputed that there is no evidence to support such a finding, the imposition of treble damages under § 196.64, STATS., is not warranted.

The farm argues that we should apply *Peissig* standards to pre-1990 conduct because *Peissig* did not change the law but only clarified the law. We are bound by supreme court precedent. *State v. Lossman*, 118 Wis.2d 526, 533, 348 N.W.2d 159, 163 (1984). *Beacon Bowl* expressly states that before *Peissig*, a finding of wilful, wanton or reckless conduct was required. *Beacon Bowl*, 176 Wis.2d at 774, 501 N.W.2d at 801. Consequently, we conclude that absent any showing of such conduct, § 196.64, STATS., treble damages are not warranted.¹⁴

By the Court. – Judgment affirmed. No costs on appeal.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.

¹⁴ The parties devote much of their argument to whether the record discloses a violation of ch. 196, STATS. Because we apply the pre-*Peissig* standard to pre-1990 conduct, we do not address the issue.